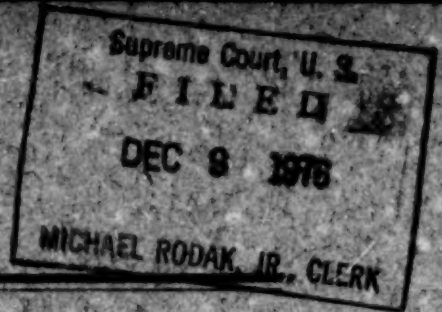


No. 76-564



**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

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**E. L. MARKHAM, JR., PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1, pp. 1-12) is reported at 537 F. 2d 187.

**JURISDICTION**

The judgment of the court of appeals was entered on August 18, 1976. A petition for rehearing was denied on September 22, 1976. The petition for a writ of certiorari was filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether the district court abused its discretion by curtailing the cross-examination of two witnesses.
2. Whether the evidence is sufficient to support the conviction.

3. Whether the indictment informed petitioner of the elements of the offense.

4. Whether there was a variance between the indictment and the proof.

5. Whether 18 U.S.C. 1001 is unconstitutionally vague.

#### STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of covering up and concealing from the Patent Office the true inventor of improvements claimed in a patent application, in violation of 18 U.S.C. 1001. Petitioner was sentenced to two years' probation and fined \$5,000. The court of appeals affirmed. The facts are adequately stated in the court of appeals' opinion (Pet. App. 1, pp. 2-5).

#### ARGUMENT

1. Petitioner argues that the district court abused its discretion by curtailing the cross-examination of two witnesses. These arguments are unsound.

a. The court sustained an objection to the question, asked of a patent attorney, whether the attorney found in his conferences with petitioner "any evidence [that petitioner sought] by trick, scheme, or device, to withhold information from the Patent Office" (Pet. 10). Petitioner argues that the answer to this question would have been admissible under Fed. R. Evid. 704, which permits opinion testimony. Rule 704 does not, however, require the court to admit every proffered opinion. It authorizes the use of opinion testimony only when "otherwise admissible." Admission of expert opinions is subject to the discretion of the trial court, and its rulings are to be sustained unless "manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35. In this case,

as the court of appeals held, the question was repetitious; it was "no more than a rephrasing of questions already put by defense counsel to the witness, and answered by him without objection" (Pet. App. 1, p. 12). Petitioner does not challenge this assessment, and it supports the district court's decision.

b. The trial court also declined to permit extended cross-examination of Orlando Klein, the true inventor, concerning the contents of letters Klein had written to government officials. Petitioner sought to demonstrate Klein's bias against petitioner (Pet. 13), but the court of appeals correctly held that petitioner already had been allowed ample opportunity to show Klein's bias. Indeed, it found that bias had been "fully established," and that the district court had permitted questioning "to the outer limits of permissible inquiry" (Pet. App. 1, p. 11). There is no reason for this Court to review this factual assessment.

2. The evidence, now taken, together with all reasonable inferences, in the light most favorable to the prosecution (*Glasser v. United States*, 315 U.S. 60, 80) is ample to support the conviction. It demonstrated, as the court of appeals showed (Pet. App. 1, pp. 2-5, 8-10), that petitioner, who well knew that Klein invented the "Drycore" system, represented on three occasions to the Patent Office that others had invented the system, and that petitioner willfully concealed or covered-up Klein's role in the invention even after the other purported "inventors" had disclaimed the invention. Petitioner argues (Pet. 13-14) that the court of appeals did not follow precedent set by other panels of that court,<sup>1</sup> but such an intra-

<sup>1</sup>Petitioner is incorrect in stating that the decision in this case departs from Fifth Circuit law. The one case petitioner cites (Pet. 14) holding that the evidence must exclude every reasonable



circuit conflict would be for that court to resolve. *Wisniewski v. United States*, 353 U.S. 901, 902.

3. Petitioner's contention that the indictment is insufficient does not withstand analysis.<sup>2</sup> The indictment specified that petitioner concealed the material fact that Roberts and Shipley (the asserted inventors) "made no inventive contribution at all to some of the improvements \* \* \* claimed in the patent application, including that covered by one or more of the following claims: 14, 17, 22 and/or 24" (Pet. App. 3, p. 3). This allegation is explicit. No more is needed, as the court of appeals explained (Pet. App. 1, p. 7):

The indictment specified that the building process was developed by Klein, that [petitioner] knew this, and that [petitioner] knowingly and willfully misrepresented to the Patent Office that Shipley and Roberts were the true inventors. The indictment charged much more than that somewhere within the

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hypothesis consistent with innocence was wrongly decided (*Holland v. United States*, 348 U.S. 121, 139-140) and has not been followed. See, e.g., *United States v. Bass*, 490 F. 2d 846, 855 (C.A. 5); *United States v. Warner*, 441 F. 2d 821, 825 (C.A. 5), certiorari denied, 404 U.S. 829; *United States v. Diez*, 515 F. 2d 892, 902 (C.A. 5), certiorari denied, 423 U.S. 1052; *United States v. Parr*, 516 F. 2d 458, 463-464 (C.A. 5); *United States v. Reynolds*, 511 F. 2d 603, 606 (C.A. 5); *United States v. Smith*, 523 F. 2d 771, 774 (C.A. 5), certiorari denied, October 4, 1976, No. 75-1451.

<sup>2</sup>Petitioner appears to argue that the sufficiency of the indictment rests entirely on Paragraph 8 (Pet. 14). However, that paragraph is but one of three substantive paragraphs, each supplying a different part of the charge. Paragraph 7 contains the elements of the offense charged, Paragraph 8 contains the material facts alleged to have been concealed, and Paragraph 9 contains the acts done by petitioner to effectuate the concealment (Pet. App. 3, pp. 3-5). Paragraphs 4 and 5 also contain significant factual averments (Pet. App. 3, p. 2). The validity of the indictment is determined by reading the indictment as a whole. *Dunbar v. United States*, 156 U.S. 185, 190.

lengthy patent application there lay an unidentified idea attributable to Klein which [petitioner] concealed from the government.

4. Petitioner argues that there was a variance between the indictment, which alleged concealment of material facts from the Patent Office, and the proof. Petitioner contends that the government proved false representation (also prohibited by 18 U.S.C. 1001), although he does not say the government failed to prove concealment. In support of this argument, he quotes language from the prosecutor's closing argument and asserts: "Thus did the government base its case on falsity" (Pet. 15).

The argument misunderstands the nature of the crime. As the court of appeals noted, "[c]oncealment and falsity were bound together in the context here" (Pet. App. 1, p. 7). Concealment implies covering up the truth, which can be done by omitting information and by purveying lies or misleading stories. Here petitioner concealed the identity of the true inventor by asserting under oath that two other people were the true inventors. Petitioner cites no facts in the indictment that the government failed to prove. That the government may have proved that part of the concealment was brought about by lying does not show a variance.

5. Finally, petitioner's contention that 18 U.S.C. 1001 is unconstitutionally vague (Pet. 16) is both untimely and unsound. The issue was not raised below, and there is no reason to consider it now. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2. Moreover, the argument is insubstantial. Cf. *United States v. Powell*, 423 U.S. 87. Section 1001 proscribes activities long held to be culpable, in terms heavy with common law elaboration. Cf. *Rose v. Locke*, 423 U.S. 48. It makes illegal the knowing and willful concealment of material facts

in dealings with government agencies. Its requirement of specific intent relieves the statute of any possible uncertainty. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163; *Screws v. United States*, 325 U.S. 91, 101-107.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1976.